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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FIFTH APPELLATE DISTRICT**

DARRELL ARCHER,

Plaintiff and Appellant,

v.

DAVID P. ZUNIGA et al.,

Defendants and Respondents.

F076085

(Super. Ct. No. BCV-15-100691)

**OPINION**

**THE COURT**[*]

APPEAL from a judgment of the Superior Court of Kern County. Sidney P. Chapin, Judge.

Darrell Archer, in pro. per., for Plaintiff and Appellant.

Law office of Roger Lampkin, Roger Lampkin and Douglas Moffat for Defendants and Respondents.

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[*] Before Hill, P.J., Levy, J. and Detjen, J.

Appellant Darrell Archer sued his neighbors, alleging the incessant barking of their dog was a nuisance. The trial court found a private nuisance existed and awarded Archer $2,500 as noneconomic damages for annoyance and discomfort. The court distinguished these damages from damages for mental or emotional distress. The court also stated Archer did not prove malice and declined to award punitive damages. Archer appealed, contending the court should have awarded him damages for emotional distress and punitive damages.

The standard of appellate review plays a significant role in the outcome of this case. That standard is tailored specifically to a trial court's determination that an appellant failed to carry his or her burden of proof. A failure-of-proof determination will be upheld by the reviewing court unless the evidence compels a finding in favor of the appellant as a matter of law. A finding is compelled when the appellant's evidence is (1) uncontradicted and unimpeached *and* (2) of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding. (*Dreyer's Grand Ice Cream, Inc. v. County of Kern* (2013) 218 Cal.App.4th 828, 838 (*Dreyer's*).)

As explained below, Archer's evidence was not of such a character and weight as to compel a finding that Archer suffered extreme or severe emotional distress. Similarly, his evidence of malice lacked sufficient detail to compel a finding of malice and an award of punitive damages.

We therefore affirm the judgment.

## FACTS

Archer, his wife, Keitha Darquea, and a teenage son lived in a house on Bladen Street in Bakersfield. During the time relevant to this lawsuit, Archer and Darquea were retired. Archer owns real estate in Bakersfield, Taft, northern California, Arizona and Florida, which are mostly rental properties.

In December 2013, defendants David and Maria Zuniga and their children moved into the house next door to Archer. The Zunigas owned a dog that was about four or five

years old at the time. The dog had been with them since it was a puppy. The Zunigas initially housed the dog in a kennel, approximately 8 feet by 10 feet, placed next to the fence that separated their property from the property of Archer and his wife.

Darquea testified the dog's barking was a regular occurrence. She believed the Zuniga's gave the dog little attention, "so the dog was just totally bored and he just entertained himself by barking at anything he could hear anywhere any time." Darquea testified the dog started barking every time she went into the backyard, when she got out of a car in the driveway, and "[i]f he could hear a footstep, a sliding door, any – any noise whatsoever, he would start barking." She also stated they were not able to use their swimming pool without listening to the dog barking.

Archer went to Maria Zuniga and explained that he did not like the barking and that he had had some success in using water to train a dog to stop barking. Archer asked for her permission to spray the dog with water and she agreed. Later, when the dog was barking, Archer got his hose and sprayed the dog while Maria and her daughter watched. Archer described the results as follows: "The dog seemed starved for attention and absolutely loved the attention and the water. It ran around in the kennel[,] barked and jumped up and bit at the water. It had a really good time, but it never stopped barking. I sprayed the dog one more time with the same result." Archer testified he never sprayed the dog again.

Archer called animal control several times about the barking and testified they did nothing. Maria Zuniga testified she received three letters from animal control and, after the third letter, she telephoned the animal control clerk. The clerk asked her what they had done to stop the barking and Maria stated they had moved the dog to the center of the yard. The clerk suggested the use of a barking collar whenever Archer was in town, which the Zunigas tried. They removed the collar after a week because it was hurting the dog, they did not believe it was needed, and it was scarring the dog's neck.

On March 18, 2015, Archer was in the backyard doing repairs on pool equipment. The dog's barking made it difficult for him to think and figure out how to fix the problem. As a result, Archer grew irritated. He picked up a mushy grapefruit and threw it over the fence in the direction of the dog. He also yelled several times at the dog to be quiet, but the dog continued to bark.

The Zunigas saw Archer throw the grapefruit and called the police. When the police arrived they saw Archer throw another grapefruit over the fence. The police charged Archer for animal cruelty. Archer asked the police to charge the Zunigas with disturbing the peace and the officers refused. Later, the district attorney dismissed the animal cruelty charge. Archer testified two grapefruit and one ball were the only things he ever threw into the Zunigas's yard. Archer said the ball was in his yard, he assumed it came from their yard, so he tossed it back over the fence.

A couple of months after his arrest, Archer took a picture of the dog kennel. David Zuniga was in the area and words were exchanged. Archer testified that after the episode he felt filing a lawsuit against the Zunigas was the only choice left to him.

**PROCEEDINGS**

In August 2015, Archer filed a complaint against the Zunigas and their daughter as an unlimited civil action. The summons and complaint were served on the Zunigas in September 2015 and they filed their answer later that month. About a year after the lawsuit was filed, the dog died.

In March 2017, shortly before trial, the Zunigas retained an attorney. The bench trial was conducted on April 3 and 4, 2017. The witnesses included Archer, Darquea, neighbors who lived on the other side of Archer, the Zunigas, and their daughter.

On June 6, 2017, the trial court issued its ruling. The court found the Zunigas maintained a private nuisance and awarded Archer $2,500. The court dismissed the complaint as to their daughter. The court stated Archer would bear his own costs as the judgment was an amount within the jurisdictional amount of limited civil cases. The

court distinguished the general noneconomic damages it awarded for annoyance and discomfort from damages for mental or emotional distress. The court also stated Archer did not carry his burden of proof on any claim for economic damages or establish malice on the part of defendants. In July 2017, Archer filed a notice of appeal.

## DISCUSSION

### I. STANDARD OF REVIEW

" 'A judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' " (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564, italics omitted.)

In this appeal, Archer has phrased his arguments of trial court error using the substantial evidence standard of review. Where, as here, the trier of fact has determined the party with the burden of proof did not carry that burden, "it is misleading to characterize the failure-of-proof issue as whether substantial evidence supports the judgment. . . . [¶] Thus, where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) 'uncontradicted and unimpeached' and (2) 'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.' [Citation.]" (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528; see *Dreyer's*, *supra*, 218 Cal.App.4th at p. 838; *Valero v. Board of Retirement of Tulare County Employees' Assn.* (2012) 205 Cal.App.4th 960, 965.) Accordingly, we conclude the finding-compelled-as-a-matter-of-law standard applies to the trial court's determinations that Archer failed to carry his burden of proof.

## II. DAMAGES FOR EMOTIONAL DISTRESS

### A. Legal Principles

#### *1. Elements of a Claim*

The elements of a cause of action for intentional infliction of emotional distress are: (1) the defendant engages in extreme and outrageous conduct with the intent to cause, or with reckless disregard for the probability of causing, emotional distress; (2) the plaintiff suffers extreme or severe emotional distress; and (3) the defendant's extreme and outrageous conduct was the actual and proximate cause of the plaintiff's extreme or severe emotional distress. (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001.) "[T]he alleged conduct ' ". . . must be so extreme as to exceed all bounds . . . usually tolerated in a civilized community." ' " (*Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 494.) Further, the requisite severe emotional distress must be such that " ' "no reasonable [person] in civilized society should be expected to endure it" ' " (*Potter*, *supra*, at p. 1004) and the defendant's conduct must be " ' "intended to inflict injury or engaged in with the realization that injury will result" ' " (*id.* at p. 1001).

#### *2. Proof of Severe Emotional Distress*

In this section, we discuss the evidence that can be presented to prove the existence of severe emotional distress and the relative strength of different types of evidence. In *Miller v. Willbanks* (Tenn. 1999) 8 S.W.3d 607, the court recognized that severe emotional distress can be proven with various types of evidence, including the claimant's own testimony and the testimony of other lay witnesses acquainted with the claimant. (*Id*. at p. 615.) "Physical manifestations of emotional distress may also serve as proof of serious mental injury. Moreover, evidence that a plaintiff has suffered from nightmares, insomnia, and depression or has sought psychiatric treatment may support a claim of serious mental injury." (*Ibid*.) The court noted that "[s]uch proof, however, is no guarantee that a plaintiff will prevail" because the weight and credibility given to the testimony lies with the trier of fact, who is free to conclude the subjective testimony of a

plaintiff or other lay witnesses is insufficient to prove severe emotional distress. (*Ibid*.) Consequently, the court stated that, though not required, expert testimony might be the most effective method of proving the existence of severe emotional distress. (*Ibid*.; see Larsson, Cause of Action for Intentional Infliction of Emotional Distress, 44 Causes of Action 2d 1 (2010) § 20.) The court also noted, consistent with its conclusion, that a majority of jurisdictions do not require expert testimony to establish severe emotional distress. (*Miller*, *supra*, at p. 613.)

Some California decisions have discussed types of evidence that are not essential to proving severe emotional distress. For example, a plaintiff need not prove a resulting physical disability. (*Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376, 396-397.) Also, California law does not require a plaintiff to demonstrate " 'objective symptoms' " to recover damages for severe emotional distress. (*Hailey v. California Physicians' Service* (2007) 158 Cal.App.4th 452, 477.) Nevertheless, manifestations of the distress are helpful to proving its existence and the requisite severity. For instance, in *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, the California Supreme Court concluded that evidence of "alcoholism, severe headaches, insomnia, tension and anxiety" adequately supported the finding that the plaintiff suffered severe emotional distress. (*Id*. at p. 909.) In *Hailey v. California Physicians' Service*, *supra*, 158 Cal.App.4th 452, the plaintiff alleged the wrongful rescission of his health coverage caused severe emotional distress, which resulted in vomiting, stomach cramps, and diarrhea. (*Id*. at pp. 476-477.) The appellate court concluded these allegations satisfied the element of severe emotional distress and reversed the order sustaining the defendant's demurrer. (*Id*. at pp. 477-478.)

B. Archer's Evidence

During the trial, defense counsel asked Archer, "With regards to the mental anguish, did you seek any kind of medical aid or treatment in connection with your

mental anguish?" Archer answered, "I sought a different place to go so I could get away from it and not listen to it." Archer also stated the "barking dog caused me mental anguish and forced me to leave my home a lot more times than I would have normally." He stated that being forced out of his home because he could not stand the noise caused frustration, which he regarded as a personal injury. When asked how many days he suffered personal injury, Archer stated he could not tell for sure and did not have an estimate at that point in time. In explaining the incident where he threw grapefruit in the dog's direction, Archer stated: "I was extremely frustrated because that dog wouldn't quit barking and it was just driving me crazy. I couldn't think straight."

Archer presented his case without offering expert testimony on the subject of his emotional distress. There was no evidence he went to a psychologist, psychiatrist, psychotherapist, or medical doctor to obtain treatment for his emotional distress. Also, he never testified as to any physical manifestations of his emotional distress, such as headaches, nausea or weight gain or loss.[1]

We conclude that Archer's evidence was not " 'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.' [Citation.]" (*In re I.W.*, *supra*, 180 Cal.App.4th at p. 1528; accord, *Dreyer's*, *supra*, 218 Cal.App.4th at p. 838.) As observed by the Supreme Court of Tennessee, the testimony of a plaintiff and other lay witnesses (such as Archer's wife and his neighbors) provides no guarantee that the plaintiff will prevail. (*Miller v. Willbanks*, *supra*, 8 S.W.3d at p. 615.) The weight and credibility given to such testimony lies with the trier of fact and the trier of fact is free to conclude the subjective testimony of a plaintiff or other lay

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[1] During oral argument, Archer stated he started taking a drug to calm down. Evidence of the use of medication was not presented to the trial court. Under the principles governing appellate procedure, a reviewing court cannot determine an error occurred based on evidence or facts not presented to the trial court. (See *Newton v. Clemons* (2003) 110 Cal.App.4th 1, 11 [reviewing courts disregard facts not presented and litigated in the trial court].)

witnesses is insufficient to prove severe emotional distress. (*Ibid*.) Here, Archer's testimony about his frustration and spending time at other properties to avoid the barking dog did not compel the trial court to find Archer suffered extreme or severe emotional distress.

## III. PUNITIVE DAMAGES AND MALICE

### A. Legal Principles

#### *1. Statutory Provisions*

Archer's nuisance claim was based on the portion of the Civil Code section 3479, which defines nuisance as including "[a]nything which . . . is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property."

Archer's claim to punitive damages was based on Civil Code section 3294, subdivision (a), which authorizes the recovery of such damages in noncontractual cases "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice." " 'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (Civ. Code, § 3294, subd. (c)(1).) Here, Archer contends he established malice by showing defendants acted "with a willful and conscious disregard of the rights . . . of others." (*Ibid*.)

#### *2. Case Law*

Under California law, a punitive damages award must be based on three factors: (1) the reprehensibility of the defendant's conduct; (2) the amount of compensatory damages awarded to or actual harm suffered by the plaintiff; and (3) the defendant's financial condition. (*Behr v. Redmond* (2011) 193 Cal.App.4th 517, 535.) " 'Something more than the mere commission of a tort is always required for punitive damages. There

must be circumstances of aggravation or outrage, such as spite or "malice," or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that his conduct may be called willful or wanton.' [Citation.]" (*Taylor v. Superior Court of Los Angeles* (1979) 24 Cal.3d 890, 894-895, italics omitted.)

B. Trial Court's Decision

The trial court's written decision found that defendants failed on several occasions to control the barking of the dog under their control, they acknowledged the problem by efforts to control the barking by putting the dog in the garage, moving its pen away from the common fence, and using a dog barking collar. The court stated that such efforts appeared to have been only temporarily effective.

The court also stated Archer did not carry his burden of establishing malice on the part of defendants. The court noted Archer did not present any documentary evidence in the form of calendar entries of barking events or recordings of dog barking events, but presented only generalized testimony as to the frequency and duration. The court stated Archer was not a regular occupant of his wife's property, and was absent frequently for up to weeks at a time. The court stated Archer's reactions to the barking, which included spraying the dog with water and throwing fruit at it, may have aggravated the situation to some extent.

C. Application of Standard of Review

From the trial court's written ruling, it is reasonably clear that (1) the lack of specific evidence about the frequency and duration of barking events and (2) the attempts by defendants to take some remedial action were reasons the court concluded Archer had not proven by clear and convincing evidence that defendants willfully and consciously disregarded his right to the quiet enjoyment of the home.

The clear and convincing standard requires that the evidence be so clear as to leave not substantial doubt—that is, sufficiently strong to command the unhesitating assent of every reasonable mind. (*In re Angelia P.* (1981) 28 Cal.3d 908, 919.) The absence of specific evidence about the frequency and duration of barking events and the attempts by defendants to take some remedial action could cause a reasonable mind to hesitate in reaching a conclusion that defendant's conduct was malicious. Thus, the evidence offered by Archer was not of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding of malice under the clear and convincing standard of proof. (See *Dreyer's, supra*, 218 Cal.App.4th at p. 838.) Accordingly, Archer has not demonstrated the trial court erred when it determined the evidence did not justify an award of punitive damages.

**DISPOSITION**

The judgment is affirmed. The parties shall bear their own costs on appeal.